

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 August 2007

Public Authority: Commission for Local Administration in England
(Local Government Ombudsman)
Address: 10th Floor
Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant made a request to the Local Government Ombudsman for information related to a complaint he had previously made against Portsmouth City Council. The public authority refused the request on the basis that information related to its investigations is exempt under section 44 of the Act. The public authority confirmed that the relevant statutory prohibition is section 32(2) of the Local Government Act 1974. The Commissioner has investigated the complaint and has found that, to the extent that the public authority holds any recorded information falling within the scope of the request, the exemption was correctly applied. However the Commissioner has also found that the public authority breached section 17 of the Act by issuing the complainant with an inadequate refusal notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the public authority on 7 June 2005 to request information regarding a complaint he had previously made against Portsmouth City Council. The complainant was essentially asking the public authority to clarify and further explain its decision not to uphold his complaint against the Council. The complainant separated his request into three parts:

- I. Firstly, the complainant asked the public authority to provide him with documentary evidence to support a statement referred to in its decision on his complaint against Portsmouth City Council
 - II. The complainant also asked the public authority to explain a particular paragraph in its decision and to disclose any documentary evidence it held to support these comments made in this paragraph.
 - III. Finally, the complainant asked the public authority to explain how it had concluded that a report, which he had produced, did not provide evidence to show that the Council had acted with maladministration in respect of his complaint.
3. A full text of the request is included in annex A.
 4. The public authority responded to the request on 4 July 2005. In respect of part I of the request the public authority informed the complainant that he had previously been advised that it would not enter into further correspondence about this matter and that therefore it would not address this point. In respect of part II of the request the public authority sought to clarify and provide further explanation regarding the paragraph from its decision, which the complainant had referred to. In response to part III of the request the public authority explained that it did accept that the complainant had produced a professional report which supported his complaint, but having considered comments made by the Council, it was not persuaded that the complainant's view - that the Council acted with maladministration - was correct.
 5. The public authority said that it was not providing the information described in paragraph 4 under the Act because section 44 of the Act contains an exemption for the public authority whereby it is not obliged to provide documentation relating to its investigations.
 6. On 5 July the complainant wrote to the public authority to ask that it carry out an internal review of its handling of his request. The complainant specifically asked the public authority to reconsider its decision to refuse the request and to further explain its application of the section 44 exemption.
 7. The public authority responded on 11 August 2005. It explained that the complainant's request asked for clarification on three matters and on two of them asked for documentary evidence to support statements made in the public authority's decision on the complaint against the Council. In responding the public authority said that it had nothing to add to the response of 4 July 2005. The public authority also said that there is no further documentary evidence which it could send to the complainant because he had previously been sent all of the information on which its decision on the complaint against the Council was based.

The Investigation

Scope of the case

8. On 16 August 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse his request under section 44 of the Act. The complainant also asked the Commissioner to consider the length of time the public authority took to respond to his request.
9. The Commissioner has also considered whether the public authority issued the complainant with an adequate refusal notice in accordance with the Act.

Chronology

10. On 19 July 2006 the Commissioner contacted the public authority to clarify which statutory prohibition it was relying on when it applied section 44 to the complainant's request. In response the public authority confirmed it was relying on the statutory prohibition provided in section 32(2) of the Local Government Act 1974.
11. The Commissioner asked the public authority to provide further clarification on the information it was exempting under section 44 of the Act.
12. On 23 August 2006 the public authority provided the Commissioner with this further clarification. It explained that it relies on the section 44 exemption to exempt from disclosure all information gathered in the course of its investigation. However, the public authority said that, notwithstanding the fact that it believed it could rely on the section 44 exemption, in this instance it had provided the complainant with all of its correspondence with the Council on the basis that he was a party to the complaint. The Council also said that it had not disclosed to the complainant internal information related to his complaint such as internal memoranda, notes of telephone calls or file notes.
13. On 30 October 2006 the complainant wrote to the Commissioner to provide further information as to how he wished to proceed with his complaint against the public authority. He explained that he had made a freedom of information request to the Council and as a result of this he believed that the public authority held no information in respect of parts I and II of his request. The complainant said that the only outstanding matter was part III of his request. He confirmed that he wanted to pursue his complaint in respect of the public authority's response to this part of his request.
14. On 9 July 2007 the public authority provided the Commissioner with its complaint file on the complainant. This file included all of the information it held in respect of the complainant's complaint against the Council which had not previously been disclosed to him or which he had not otherwise had access to.

Findings of fact

15. The complainant's complaint against the Council relates to the granting of planning permission for a building which adjoins his property and which the complainant alleged causes an unacceptable loss of light to his own property and to his neighbours' property.
16. The public authority received the complainant's request on 9 June 2006.

Analysis

17. A full text of the statutes referred to in this section is contained within Annex B.

Procedural matters

18. The complainant made his request on 7 June 2005 and this was received by the public authority on 9 June 2006. The public authority responded to the request on 4 July 2006 and therefore within the 20 working days provided for in section 10 of the Act.
19. If a public authority is relying on a claim that information is exempt from disclosure then it must provide the applicant with a refusal notice. Under section 17(1)(c) a refusal notice must state why the exemption applies. Whilst the public authority's refusal notice of 4 July 2005 explained that it was relying on section 44 of the Act it did not explain which statutory prohibition applied.
20. Section 17(7) of the Act provides that a refusal notice must contain details of its internal review procedure or else state that it has no such procedure. A refusal notice must also contain details of the applicant's right to complain to the Commissioner. The public authority's refusal notice of 4 July 2005 contained none of these details.

Exemption

21. Although the public authority refused the request on the basis that any information it held as a result of its investigation is exempt under section 44; it appears that what the complainant really wanted was for the public authority to explain to him how it reached its decision on his complaint against Portsmouth City Council. This is evident from the complainant's initial letter to the Commissioner in which he highlights an extract from the public authority's annual report which states that it will "explain fully the reasons for our decisions". The complainant makes it clear that this is at the heart of his complaint. Indeed, in his letter to the Commissioner dated 30 October 2006 the complainant refers to this extract again and states "this is all I am asking for". The complainant has informed the Commissioner that he is limiting his complaint to only cover the public authority's response to part III of the request. This is what the Commissioner has considered when making his decision.
22. Under part III of the request the complainant specifically wants the public authority to explain why it believes that the evidence he provided did not prove that the Council had acted with maladministration. However, under the Act a

public authority is only obliged to provide information which it holds in a recorded form. A public authority is not obliged to create information in response to a freedom of information request.

23. The public authority has applied section 44 of the Act to part III of the complainant's request and has confirmed that it does hold internal information such as internal memoranda, notes of telephone calls and files notes and that this information has not been disclosed to the complainant. The public authority has treated the questions asked by the complainant in part III as a request for information under the Act and therefore the Commissioner has not questioned this assessment when reaching his decision. In reaching his decision the Commissioner has considered the extent to which information withheld from the complainant would be covered by the statutory prohibition.
24. After reviewing the contents of the complaint file the Commissioner has found that some of the information deals with the public authority's decision making process in respect of the complaint against the Council. This information is typically comprised of internal emails and memoranda discussing the merits of the complaint against the Council and the evidence provided by the complainant. The Commissioner considers such information to fall within the scope of part III of the request.
25. The Commissioner accepts that section 32(2) of the Local Government Act 1974 acts as a statutory prohibition on information obtained in the course of or for the purposes of an investigation and that responding to a freedom of information request is not one of the reasons for disclosure provided for in sub-sections a) – c) of section 32(2). The issue to be considered here is whether the information falling within the scope of part III of the request was obtained in the course of, or for the purposes of, its investigation of the complaint against Portsmouth City Council.
26. The complainant has already been provided with the information which the public authority received from the Council. The only information which the complainant has not received is internal information; that is to say information generated by the public authority itself. As mentioned previously this typically comprises internal memoranda, emails and file notes. It is the Commissioner's view that where such information draws upon or makes reference to the complaint against the Council or any information which has been obtained in the course of the investigation then this is covered by the statutory prohibition. Whilst the documents containing the information have been generated by the public authority itself and have therefore not been physically obtained, it is clear that the information contained within these documents will have been obtained in the course of, or for the purposes of, the investigation into the complaint against Portsmouth City Council.
27. Section 44 is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.
28. The Commissioner recognises that in its refusal notice of 4 July 2005 the public authority provided the complainant with some information. However the Commissioner considers this to be a refusal of the request under section 44 of the Act and that any information that was disclosed was done so at the discretion

of the public authority under sub-section a) of section 32(2) of the Local Government Act 1974. The Commissioner recognises that the public authority has discretion to disclose information obtained in the course of or for the purposes of an investigation where it believes that it would be beneficial for the purposes of that investigation. In reaching his decision the Commissioner has not sought to question the public authority's use of its discretion in this regard.

The Decision

29. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority correctly applied the section 44 exemption to the information it held which fell within the scope of the request.
 - The public authority responded to the request within 20 working days and therefore met its obligation under section 17(1).
30. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 17(1)(c) by failing to explain why section 44 applied to the information requested.
 - The public authority breached section 17(7)(a) by failing to either provide details of its internal review procedure or confirm that it had no such procedure in place.
 - The public authority breached section 17(7)(b) by failing to inform the complainant with details of his right to complain to the Information Commissioner.

Steps Required

31. The Commissioner requires no steps to be taken.

Right of Appeal

32. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of August 2007

Signed

**Jane Durkin
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex A

1. The final sentence of paragraph 2 'that the amended proposals were acceptable.' I have seen two Council documents that show that the proposals were unacceptable but no evidence to support this statement by [name redacted.] Would you please forward the documentary evidence to me to support this statement by [name redacted]?
2. Could you please explain the logic from the sentence until the end of paragraph three and its relevance to our complaint particularly sentence 4 'It also confirmed...' Please again provide the evidence from the Council to support the statement in this sentence to justify the Council's assertion of acceptability.
3. In paragraph 4, you have not explained why my report 'does not seem to me that it provides further evidence ...or was otherwise unreasonable.' Bearing in mind that we have produced a professional report to support our complaint and the Council have produced no evidence whatsoever to refute it, this is to say the least a bizarre conclusion. Please explain how you have come to this conclusion with the facts that have been presented to you.

Annex B (Legal Annex)

Section 10 provides that –

Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17(1) provides that –

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 17(7) provides that –

A notice under section subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 32(2) of the Local Government Act 1974 provides that:

Information obtained by a local Commissioner, or any officer of either Commission, in the course of or for the purposes of an investigation under this part of the Act shall not be disclosed except

- a) for the purposes of the investigation and of any report to be made under section 30 or 31 above; or
- b) for the purposes of any proceedings for an offence under the Official secrets Acts 1911 to 1939 alleged to have been committed in respect of information obtained, by virtue of this part of this Act, by a local Commissioner or by an officer of either Commissioner or for an offence of perjury alleged to have been committed in the course of an investigation under this part of this Act or for the purposes of an enquiry with a view to the taking of such proceedings, or
- c) for the purposes of any proceedings under section 29(9) above